

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of EDWARD L. KENDRICK and DEPARTMENT OF LABOR,  
MINE SAFETY & HEALTH ADMINISTRATION, Pikeville, KY

*Docket No. 98-1561; Submitted on the Record;  
Issued December 21, 1999*

---

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

On December 14, 1993 appellant, then a 57-year-old coal mine electrical inspector, filed a claim for injuries to his right leg when he slipped and fell while going through a man door opening. The Office accepted appellant's claim for contusion and abrasion of the right leg.

After further development of the medical evidence, the Office, by decision dated August 30, 1994, found that medical care was not authorized after March 25, 1994 as the accepted condition had resolved by then. The Office further found that appellant's work-related injury did not cause a back or venous condition and medical bills for expenses related to those conditions were not authorized or payable by the Office.

Appellant requested an oral hearing and, by decision dated February 7, 1997 and finalized on February 11, 1997, an Office hearing representative affirmed the earlier decision that appellant's back and venous conditions were not causally related to the work injury appellant sustained on December 14, 1993.

In a February 10, 1998 letter, appellant, through his attorney, requested reconsideration. Appellant's attorney stated that medical evidence would be forthcoming. The Office received appellant's reconsideration request on February 17, 1998 without any additional evidence.

By decision dated March 16, 1998, the Office denied appellant's request for merit review as untimely filed and further determined that appellant had failed to present clear evidence of error on the part of the Office in denying the claim.

The Board has duly reviewed the case and finds that, although the Office improperly found that appellant's request for reconsideration was untimely, the Office did not abuse its discretion in denying a merit review.

The only decision before the Board on this appeal is the Office's March 16, 1998 decision denying appellant's request for a review on the merits following the Board's decision dated February 7, 1997 and finalized February 11, 1997. Because more than one year has elapsed between the issuance of the Office's August 30, 1994 decision denying compensation for appellant's back and venous conditions along with the February 11, 1997 decision affirming the prior decision, the Board lacks jurisdiction to review those prior Office decisions.<sup>1</sup>

The Office's regulations at 20 C.F.R. § 10.138(b)(1) provide that a claimant may obtain a review of the merits of his or her claim by: (1) showing that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>2</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>3</sup> When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Federal Employees' Compensation Act.<sup>4</sup> The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.<sup>5</sup> This regulation, however, does not specify when an application is "filed" for the purpose of determining timeliness. The Office therefore has administratively decided that the test used in 20 C.F.R. § 10.131(a) for determining the timeliness of a hearing request should apply to applications for review.<sup>6</sup> Accordingly, timeliness is determined by the postmark on the envelope, if available. Otherwise the date of the letter itself should be used.<sup>7</sup>

The Board notes that in its March 16, 1998 decision, the Office improperly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on the issue appealed on February 11, 1997, the date the Office hearing representative finalized his decision. The Board notes that the Office failed to make as part of the record the

---

<sup>1</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>2</sup> 20 C.F.R. §§ 10.138(b)(1), (2).

<sup>3</sup> 20 C.F.R. § 10.138(b)(2).

<sup>4</sup> *Joseph W. Baxter*, 36 ECAB 228 (1984).

<sup>5</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>6</sup> Federal (FECA) Procedure Manual, Chapter 2.1602, paragraph 3(a) (January 1990).

<sup>7</sup> *Douglas McLean*, 42 ECAB 759 (1991); *William J. Kapfhammer*, 42 ECAB 271 (1990); see *Lee F. Barrett*, 40 ECAB 892 (1989).

envelope in which appellant's request for reconsideration was received. Thus, the date of appellant's reconsideration request is controlling for the issue of timeliness. Since appellant's February 10, 1998 request for reconsideration was filed within one year of the February 11, 1997 decision, the Board finds that appellant's request for reconsideration of his case was timely under the one-year limitation of section 10.138(b)(2).

Although appellant's attorney stated that medical evidence was forthcoming, the Office did not receive any supporting evidence with appellant's reconsideration request. In this case, the issue is medical in nature as the Office relied upon medical evidence to establish that appellant's back and venous conditions were not causally related to appellant's accepted work injury. Appellant has not submitted any new and relevant medical evidence, advanced a point of law or fact not previously considered by the Office or shown that the Office erroneously applied or interpreted a point of law. Accordingly, appellant did not provide a sufficient evidentiary basis for reopening his claim and the Office properly employed its discretion in refusing to reopen the case for further review on the merits.<sup>8</sup>

The Office of Workers' Compensation Programs' decision dated March 16, 1998 is affirmed as modified.

Dated, Washington, D.C.  
December 21, 1999

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member

---

<sup>8</sup> *Jimmy O. Gilmore*, 37 ECAB 257, 262 (1985).